



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

February 28, 1995

Ms. Esther L. Hajdar
Assistant General Counsel
Texas Department of Agriculture
P.O. Box 12847
Austin, Texas 78711

OR95-099

Dear Ms. Hajdar:

You have asked whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 28071.

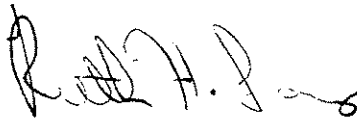
The Texas Department of Agriculture (the "department") received a request for a copy of a laboratory report pertaining to a pesticide use complaint that had been filed with the department. The department contends that the requested report is excepted from disclosure under section 552.103(a) of the Government Code. To show the applicability of section 552.103(a), a governmental entity must show that (1) litigation is pending or reasonably anticipated and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. For purposes of section 552.103(a), this office considers a contested case under the Administrative Procedure Act, chapter 2001 of the Government Code, to be litigation. Open Records Decision No. 588 (1991) at 7. The department has met its burden of showing the applicability of section 552.103(a) by providing this office documents showing litigation is pending and by submitting for review the requested report, which is related to the pending litigation. The laboratory report may therefore be withheld from disclosure under section 552.103(a).

In reaching this conclusion, we assume that the opposing party to the litigation has not previously had access to the laboratory report at issue. Absent special circumstances, once information has been obtained by all parties to the litigation, e.g.,

through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 (1982) at 2. If the opposing party in the pending litigation has seen or had access to the requested report, there would be no justification for now withholding the report from the requestor pursuant to section 552.103(a). The applicability of section 552.103(a) also ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982) (concerning pesticide complaint investigation files); Open Records Decision No. 350 (1982) at 3. We note that since the section 552.103(a) exception is discretionary with the governmental entity asserting the exception, it is within the department's discretion to release this report to the requestor. Gov't Code § 552.007; Open Records Decision No. 542 (1990) at 4.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink, appearing to read 'Ruth H. Soucy', with a stylized flourish at the end.

Ruth H. Soucy
Assistant Attorney General
Open Government Section

RHS/LRD/rho

Ref.: ID# 28071

Enclosures: Submitted documents

cc: Mr. James Mutz
J & M Helicopter Services, Inc.
1332 Washington
Alice, Texas 78332
(w/o enclosures)